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In The
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

vs.

PATRICIA GARRETT AND MILTON ASH,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF ALABAMA AMICI CURIAE IN SUPPORT OF RESPONDENTS

PAMELA L. SUMNERS*
180 N. MICHIGAN AVENUE
SUITE 2300
CHICAGO, IL 60601
(312) 201-9740
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
1733-15TH AVE. SOUTH
BIRMINGHAM, AL 35205
(205) 567-9326

Counsel for Alabama Amici

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INTEREST OF THE *AMICI CURIAE* [1]

The Alabama *Amici Curiae* are: Southern Poverty Law Center; Individual and Family Support Council of Alabama; Brenda Doss, President, ARC of the United States; People First of Alabama; ARC of Alabama; Co-Dependency Support Group for People with Mental Illness; Birmingham Independent Living Center; Alabama Council of the Blind; Alabama Association of the Deaf, Inc.; Alabama Association for Persons In Supported Employment, Inc.; Mental Health Association in Alabama; National Alliance for the Mentally Ill – Birmingham and Randolph County Chapters; Revelations of Self; Special Education Action Committee, Inc. – State Center; Alabama Head Injury Foundation, Inc.; Mental Health Consumers of Alabama, Inc.; Birmingham Council of the Blind; Mobile Independent Living Center; Family Advocacy and Community Educational Services, Inc.; National Federation of the Blind; United Cerebral Palsy of Greater Birmingham, Inc.; Montgomery Share Group; The New Group -- Montgomery; Individual and Family Support Council, Region II West; Independent Living Center of Walker County; People First – Tuscaloosa, Prattville, Space City, Walker County and Birmingham chapters; Emotions Anonymous; Mental Health Consumers of Alabama in Huntsville; Walker County Individual & Family Support Council. The Alabama *Amici* and their members advocate

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

for equal opportunities and civil rights for persons with disabilities and have an interest in ensuring equal access to state programs and services for persons with disabilities.

Also included in the Alabama *Amici are* Alabama State Employees Association, a state employees' union., and State Employees Local Union 1370, a correctional officers union. Local 1370 believes, contrary to the position taken by Petitioners' *amici* that Alabama's problems with its prison system are not due to the ADA, but rather to lack of personnel and funding.

SUMMARY OF THE ARGUMENT

Justice Brandeis memorably noted a key virtue of shared power between the national and state governments: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis' insight takes for granted that a state's experiment will be benevolent, "courageous," rather than an experiment on the liberties of its citizens.

Recently, again presuming that states do not experiment on the rights of their citizens, this Court has written, "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that '[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." *Alden v. Maine*, 527 U.S. 706, 755 (1998). The

Court made clear, however, that its confidence in the good faith of the states was premised on the fact that many states, on their own initiative, have now waived sovereign immunity in the interest of furthering the rights of citizens: "the rigors of sovereign immunity are thus mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign." *Id.* (internal quotations omitted).

Alabama is not among those states worthy of the Court's faith. Alabama has no general human rights ordinance or equal protection provision.[2] Its sole employment discrimination statute addresses only age discrimination. *See Ala. Code* § 25-1-20 (Supp. 1997). Its Constitution declares, without exception, "The State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, art. 1, § 14.

Since Alabama has declined to mitigate the rigors of sovereign immunity in the interest of justice for its citizens, the question is whether Congress may extend the hand of justice to U.S. citizens living there. This Court has held that Congress may legitimately extend its constitutional hand if there is "proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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[2] Although the topic of some debate, Alabama's Constitution does not even contain an "equal-protection provision." *Ex parte Melof*, 735 So. 2d 1172, 1181 (Ala. 1999) ("we hold that Alabama has no such "equal-protection provision").

Proportionality naturally depends upon the historical record establishing the scope of the wrong to be cured.[3] If history matters in evaluating Congress' exercise of its remedial powers, it is likewise appropriate, when Alabama seeks a ruling that it may disdain the helping federal hand as intrusive, to examine Alabama's purported efforts to cure its own wrongs and its historical treatment of citizens with disabilities.

Thus, this brief will focus, first, on Alabama's bald claim that it protects the rights of persons with disabilities on a scale that renders federal protections superfluous, and second, on the dismal historical record that belies Alabama's pretensions to Xanadu. Indeed, Alabama's history is one of abdicating the sovereign's duty to provide for the general welfare, then indulging in the fiction that a usurpatious federal government has infringed its dignity, and finally, defying federal orders designed to remedy its abdication.

Federal Judge Frank M. Johnson Jr.[4] described this pattern as the Alabama Federal Intervention Syndrome, otherwise known as the Alabama Punting Syndrome: the

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[3] For instance, the fact that Congress had not cited an example of religious discrimination in the 40 years preceding its enactment of the Religious Freedom Restoration Act was a decisive factor in this Court's determination that Congress had overextended the remedial hand. *City of Boerne*, 521 U.S. at 530.

[4] Judge Johnson was the sole federal district judge sitting in Montgomery throughout the Civil Rights Era and ordered the desegregation of most of Alabama's institutions. *See, e.g.*, Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr. and the South's Fight Over Civil Rights* 1, 2, 88 (1992).

quaint habit of ignoring its responsibilities as a sovereign until faced with a federal court order. Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, THE JUDGE'S JOURNAL Spring 1979, at 5 (hereafter "Johnson"). In the name of states' rights, Judge Johnson said, Alabama generally seeks to relieve itself of federal laws devolving from the Constitution. Johnson at 6. As a former Alabama attorney general has acknowledged, "We holler about the federal courts having too much power. But if you have states' rights, you also have states' responsibilities. The state refused to face up to its responsibilities time and time again. We abdicated our power." *Id.*

Alabama's abdication has consistently resulted in federal court cases that "rarely [come] as a surprise to anyone, because they are generally filed only after the aggrieved parties have exhausted all hope of vindicating their rights through other channels." *Id.* at 6. After federal relief is ordered, Alabama responds with malfeasance, misfeasance, and further machinations.[5]

The Alabama Punting Syndrome has dictated that, without minimal constitutional standards imposed by federal orders, "the state's mentally ill, retarded, and

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[5] For example, when Judge Johnson ordered the city of Montgomery to desegregate public parks, the City concocted a scheme whereby the YMCA operated segregated parks with governmental assistance. *Smith v. Young Men's Christian Ass'n*, 316 F. Supp. 899, 908-09 (M.D. Ala. 1970), *aff'd as modified*, 462 F.2d 634 (5th Cir. 1972). When he ordered desegregation of Macon County schools, state officials passed a "tuition-grant law" that financed a white school system. *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743 (M.D. Ala. 1964)(three-judge court).

criminally convicted citizens [have been] involuntarily confined in institutions where conditions justly have been described as barbaric and shocking." *Id.* at 7.[6] The Alabama Punting Syndrome has dictated that the state hospital for mentally ill citizens "warehoused" those who were involuntarily confined, ostensibly for "humane therapeutic reasons," and then failed to provide adequate treatment to the "[m]ore than 5,000 people [who] were crowded into dilapidated facilities and forgotten." *Id.* at 7.

In truth, then, Alabama's mode of discharging its sovereign duty to provide for the welfare of its citizens with disabilities has involved doing little to nothing until sued in federal court and then defying the courts to the edge of contempt. In the face of such a history, it now asks this Court to relieve it of the burden of federal compliance, pledging its good faith. Alabama's history does not inspire confidence in its good faith.

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[6] The Alabama Punting Syndrome is not limited to Alabama's treatment of persons with disabilities in mental hospitals. For example, Alabama prisons within recent memory were justly described as "unrelieved squalor" accompanied by "mindless brutality." Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* 11-12 (1989) (discussing for example an inmate who had trouble controlling his bowels and was confined to an upright wooden bench until he died of gangrene).

In 1997, another federal judge would note the continued vitality of the Alabama Punting Syndrome, in litigation involving abuses in the state's foster care system. *R.C. v. Nachman*, 969 F. Supp. 682, 704 (M.D Ala. 1997).

ARGUMENT

I. ALABAMA DOES NOT OFFER ITS EMPLOYEES WITH DISABILITIES THE SWEEPING PROTECTIONS IT CLAIMS, AND ITS ADMINISTRATIVE RULES, STATUTES, AND "POLICIES" DO NOT AMELIORATE THE RIGORS OF SOVEREIGN IMMUNITY.

A. Alabama Has No Statute That Makes it Illegal to Discriminate in Employment on the Basis of Disability

Despite Petitioners' grandiose claims,[7] the Alabama legislature has never enacted a law protecting Alabama's citizens with disabilities from employment discrimination. Alabama does not have a state civil rights act, a human rights act or any sort of human rights commission. Although nearly 10 percent of its working-age citizens are classified as "disabled,"[8] Alabama has not chosen to insure their rights through legislation and its constitution likewise makes no provision for their protection.

Faced with its utter lack of such legislation, Alabama here relies on an administrative rule promulgated by the State Personnel Board, *Ala. Admin. Code* r. 670-x-4-.01 (1981 & Supp. 1990), contending essentially that the

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[7] Alabama Governor Don Siegelman has publicly stated that he does not agree with the position taken by Petitioners in this case. *See* Mike Cason, "Case divides Governor, AG," Montgomery Advertiser, July 16, 2000, at 1C .

[8] Bureau of Census, U.S Dep't of Commerce, *1990 Census of Population: Social and Economic Characteristics* 182 (1993).

rule is a substitute for the ADA. (*See* Pet. Br. App. A at A1.) It is not, for a variety of reasons.

First, this Personnel Board rule applies only to a subset of state employees – those in the "classified" service – and not to all state employees, as Petitioners claim in their Brief. *See Ala. Admin. Code* § 670-x- 2-.01 (1981 & Supp. 1990). No employee of Alabama's circuit court system, district attorney's offices, legislature, universities, or other public institutions managed by a board of trustees is covered. *Ala. Admin. Code* r. 670-x-3-.01(f)(3) (1981 & Supp. 1990). *See also Ala. Code* § 36-26-10 (1991). In fact, Respondent Patricia Garrett, employed as a Director of Nursing by the University of Alabama, could not bring her claims under r. 670-x-4-.01.

Second, it is far from clear that rule 670-x-4-.03 permits "equitable and monetary relief" as Petitioners claim. (*See* Pet. Br. App. A at A1.) The regulation itself refers only to the aggrieved employee's right to appeal to the Personnel Board which "may take appropriate corrective action." *Id.* However, the related provision describing what actions the Personnel Board may take when an appeal is filed appears to limit the Board's potential actions to "reinstatement with or without pay" or dismissal. *Ala. Admin. Code* r. 670-x-5-.08(8) (1986 & Supp. 1990). The rule makes no mention of any money damages, attorneys' fees, costs or anything else traditionally regarded as "monetary relief"[9] and the

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[9] *See Curtis v. Loether*, 415 U.S. 189, 196 (1974) (contrasting language of a statute that did not permit money damages, limiting the relief to reinstatement "with or without back pay," with

decision of the Personnel Board is final. *Ala. Admin. Code* r. 670-x-4-.03 (1986 & Supp. 1990). This rule in no way serves as a substitute for the ADA

Unlike the ADA, the Personnel Board rule does not impose a duty to reasonably accommodate persons with disabilities or outlaw retaliation. Thus, Alabama's argument that its Administrative Code substitutes for ADA rights is sheerest pretense.

B. Alabama's "Policy" Articulations are Meaningless.

In support of its contention that the ADA is superfluous, Alabama has cited a number of its "policies," as though a "policy" provides affirmative rights to persons with disabilities. (*See* Pet. Apps. A, B.) Elevating these policies to the level of positive law is no more than wishful thinking on Alabama's part. In fact, a number of Alabama's present arguments are contrary to the legal positions it and its political subdivisions have taken in past cases.

Certainly, as a matter of statutory construction a "policy" is founded on "custom, which does not have the standing of statutory law." *Sutherland's Statutory Construction* § 56.01 at 303 (Norman Singer, ed., 6th ed. 2000). In keeping with this legal truism, this Court has specifically noted that, while a state may express a value judgment in hortatory language, such language may not of itself confer a cause of action. *Webster v. Reproductive*

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the language of a statute that clearly did allow the recovery of money damages).

Health Servs., 492 U.S. 490, 506 (1989). Without an enforcement mechanism, a policy is mere talk, worth no more than the paper it is written on.

The history of litigation under Alabama's "policies" bears this out. Indeed, one of the very "policies" Alabama cites (Pet. App. A-1), was held in a case predating the ADA to confer no right of action in the courts. In *Hill v. Shelby County, Ala.*, 599 F. Supp. 303 (1984), the county conceded that a disabled venireperson and defendant in a suit could not climb steps in a courthouse that had no elevator or lift to reach either the upstairs courtroom or the women's restroom. *Hill*, 599 F. Supp. at 303-04. The court construed the provision: "The blind, the visually handicapped and otherwise physically disabled shall have the same rights as the able-bodied to the free and full use of the streets, highways, walkways, public buildings, public facilities and other public places." *Id.* at 305. It found that neither the Alabama Constitution, Article I, § 13 ("all courts shall be open"), nor Alabama Code § 21-7-2 (1975) created any right of action: "Legislative recognition of a general, salutary public policy does not, without specific intent to do so, create a state liberty or property right ..." *Id.* at 305.[10]

Writing in 1984, having concluded that state law provided no right of physical access to Alabama's courtrooms, the *Hill* court held that the unfortunate plaintiff had no standing to sue "unless and until the

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[10] To this day, the Alabama statute forbidding discrimination in jury selection does not include protection from discrimination based on disability. *See Ala. Code* § 12-16-56 (1975).

Congress of the United States specifically requires elevator access to all State courtrooms, jury deliberation rooms, and restrooms. The Congress has not yet seen fit to require this." *Id.* at 305.[11]

After passage of the ADA, local courts still did not construe Alabama Code § 21-7-8's similar "policy" pronouncement to confer a right of action. In *Ethridge v. State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993), Alabama specifically argued that Alabama Code § 21-7-8 did not create a private right of action. *Ethridge*, 847 F. Supp. at 907-08. The language before the *Ethridge* court, which Alabama contended gave no redress, was: "It is the policy of this state that the blind, the visually handicapped and the otherwise disabled shall be employed in the state service... on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved." 847 F. Supp. at 908. The *Ethridge* court agreed that the policy created no enforceable right.

Likewise, Petitioners today cite the existence of two Code provisions granting a preference to blind persons to operate vending machines on state property as evidence of Alabama's solicitude toward persons with disabilities. Yet twenty years ago, Petitioner University of Alabama was in

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[11] Despite the passage of the ADA and the existence of Alabama "policies," as of April 2000, none of Alabama's 67 courthouses is in compliance with federal law, and none is completely accessible to persons with disabilities. *Update: Access to Justice*, Airmail, May, 2000, at 4-5. Alabama's State Capitol building is also not wheelchair accessible. *See* Mike Cason, "Advocates See Progress, But Fight Continues," Montgomery Advertiser, July 16, 2000 at 1A.

court arguing that it should be allowed to disregard the literal terms of the statute and impose its own criteria. It won, and the Alabama Supreme Court held that state agencies are free to prescribe their own "reasonable restrictions on the grant of the privilege." *Gundy v. Ozier*, 409 So. 2d 764 (1981). The *Gundy* court also held that Alabama Code Sections 21-1-40 and 41 do not confer an absolute preference, and moreover, legislative grants of privilege are construed strictly against the claim of the person seeking them. *Gundy*, 409 So. 2d at 766-67.

In a like vein, today Petitioner University of Alabama lists its own grievance procedures as one of the "Current Alabama Programs, Laws and Policies to Promote, Assist and Protect Persons with Disabilities." (Pet. App. B at B-1.)Yet 17 years ago it won a ruling from the Alabama Supreme Court that it was not obligated to honor the findings of its grievance committee and could fire its employees despite the committee's recommendation.[12] *Carter v. Board of Trustees of Univ. of Ala. at Birmingham*, 431 So. 2d 529, 530 (Ala. 1983).

Another Code provision touted by Alabama is its disabilities "hotline," a 1-800 number staffed by a Deputy Attorney General. (*See* Pet. App. B-3.) Ironically, Alabama's hotline, effective July 1, 1998, exists to "provide information on the rights and responsibilities under the Americans with Disabilities Act." Department of

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[12] As discussed below, the Alabama Supreme Court also held that the aggrieved employee could not sue Petitioner over his termination because the University was immune from suit. *Carter*, 431 So. 2d at 531.

Rehabilitation Servs. Quarterly Report, § VIII (April-June 2000) . *See also Ala. Code* § 21-9-14 (Supp. 1998). Thus, Alabama's Attorney General, who here argues that the ADA does not apply to the states, must appoint one deputy from his office to provide "public information," "referral, training, data collection, and analysis" on that very statute. *Ala. Code* § 21-9-14 (a) (Supp. 1998).[13] Tellingly, the hotline does not exist to provide information about Alabama's own "programs, laws and policies" – a tacit admission by the State of where protection for the rights of persons with disabilities can actually be found.

Alabama likewise boasts about Code sections 21-7-9 and -10 (App. B-4), but these housing provisions rest on air. Section 21-7-9 (1975) expressly provides: "Nothing in this section shall require any person renting, leasing or providing real property to modify his property in any way or provide a higher degree of care for a blind person, visually handicapped person or other physically disabled person" than for a person who is not. This Code provision is thus as efficacious as § 21-7-10 (1975), requiring the Governor to issue a "White Cane Safety Day" proclamation. The proclamation is a salutary gesture, but a gesture only, much like Alabama's non-actionable "policies" it wishes this Court to credit as a substitute for

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[13] The "hotline" attendant is given no enforcement powers but is charged only with reporting about "confidential" complaints to selected state officials. *Ala. Code* § 21-9-14 (b) (Supp. 1998). The lack of enforcement power is testament to Alabama's window-dressing purpose.

ADA rights.[14]

Alabama also suggests that it has expansive policies favoring deinstitutionalization and the least restrictive environment for mentally ill and mentally retarded citizens. (*See* Pet. Apps. A-1, B-6). It ignores the fact that its codification of civil commitment protections was not its own inspiration, but mandated by pre-existing federal court orders. *Compare Ala. Code* § 22-52-37 (1975) *with* discussion *infra* at II.B.[15]

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[14] Two additional statutes similarly give with one hand while taking away with the other, thereby creating a favorable first impression, but lacking real teeth. Both Alabama's Mental Health Consumers' Rights Act, *Ala. Code* § 22-56-1 *et seq.* (Supp. 1995) and its Bill of Rights for Persons with Developmental Disabilities and Traumatic Brain Injury, *Ala. Code* § 38-9C-1 *et seq.* (Supp. 1995), purport to grant "[t]he right to enforce rights in a court of competent jurisdiction or appropriate administrative proceeding." These putative waivers are undone, however, by the final provisions, which effectively reestablish the status quo: "[N]othing in this chapter shall reduce or expand the rights of mental health consumers in Alabama beyond the rights guaranteed to any other person under the statutes or Constitution of the United States and Alabama statutes or Constitution of 1901." *Ala. Code* § 22-56-10 (Supp. 1995); *Ala. Code* § 38-9C-8 (Supp. 1995). In addition, both statutes effectively exclude private providers from liability for anything other than malpractice. *See Ala. Code* §§ 22-56-2(7), 22-56-4(14), 22-56-8 (1975) *and Ala. Code* § 38-9C-3 (3) (Supp. 1995).

[15] Much the same could be said for Alabama's Mental Health Consumers' Rights Act. Almost every provision of that Act embodies the standards already set forth by the federal court during 30 years of litigation over conditions of confinement in Alabama state institutions. (*See infra* at II.B.)

C. Alabama's Constitutional Sovereign Immunity Provision Precludes the Legislature From Enacting a State Law Like the ADA.

Even assuming that Alabama's legislature were ever inclined to enact a law similar to the ADA, such a statute would be subject to attack as violative of Alabama's Constitution. Alabama's Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, Art. I, § 14. Alabama has steadfastly refused to relinquish one iota of its constitutionally mandated immunity.

Alabama case law holds that section 14 says what it appears to say. As Petitioner University of Alabama successfully argued, under § 14, it is wholly immune from lawsuits by its employees over their allegedly wrongful terminations. *Carter*, 413 So. 2d at 531 (UAB shares the state's constitutional immunity). As Justice Maddox wrote in 1971: "The wall of 'governmental immunity' is almost invincible, made so by the people through their Constitution as interpreted by this Court."[16] *Hutchinson v. Board of Trustees of Univ. of Ala.*, 288 Ala. 20, 256 So. 2d 281 (1971). Nor has the Alabama Supreme Court altered its position on this point in the intervening 30 years. Writing this summer, the court observed that "neither the

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[16] In fact, Alabama law does allow limited exceptions to this blanket statement, but no exception is wide enough to allow relief similar to that afforded by the ADA. *See Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 6 & n.9 (Ala. June 16, 2000); *Wallace v. Malone*, 279 Ala. 93, 98, 182 So. 2d 360, 363 (1964).

legislature nor this Court has the power to waive the State's immunity from suit." *Ex parte Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 16 (Ala. June 16, 2000). [17]

This constitutional provision is no mere historical holdover. During the 2000 legislative session, a bill was introduced in Alabama's House of Representatives proposing a constitutional amendment that would have allowed the Legislature to "direct in what manner, in what courts, and in what cases suits may be brought against the states and its political subdivisions." H.B. 191, 2000 Regular Leg. Sess. (Ala. March 21, 2000).[18] While the bill was in committee, the amendment was excised and the original 1901 language was restored. When the revised bill came to a vote on March 21, 2000, the Alabama House of Representatives unanimously voted to retain the 1901 provision. *Id.*

D. Alabama Failed to Cite the Statutes that Enshrine Its Discrimination Against Persons with Disabilities.

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[17] The *Cranman* court interpreted Alabama's Constitution as permitting suits against state actors in their individual capacity, but explicitly allowed those state agents to retain discretionary immunity for "hiring, firing, transferring, assigning or supervising personnel." *Cranman*, Case No. 1971903, 2000 Ala. LEXIS 273 at * 36. Previous case law suggests that the immunity afforded the state by section 14 for employment-related lawsuits cannot be avoided by suing officials or agents individually. *Carter*, 431 So. 2d at 531.

[18] This language would have mirrored, for example, that of Arizona's law.

The charts found in Appendices A and B to Petitioners' Brief purport to detail all of Alabama's laws regarding the rights of persons with disabilities. However, the provisions Alabama did not articulate speak volumes.

Alabama did not call attention to its blanket prohibition of a boating license to an "insane" person, an "idiot," a "feeble-minded" person or "any person afflicted with or suffering from a physical or mental disability." *Ala. Code* § 33-5-57 (Supp. 1994). Other Code provisions not cited by Alabama reference "lunatics" or "insane" people and "idiots." *See, e.g., Ala. Code* §§ 1-1-1 (5) (1975), 11-12-8 (1975), 12-21-165 (a) (1975), 6-2-8 (1975 & Supp. 1996), 6-2-41 (1975), 6-4-21 (1975), and 15-16-22 (1975). Alabama still provides for acquisition or construction of "insane asylums" along with "poorhouses," "workhouses," and "convict camps." *Ala. Code* §§ 11-81-80 (1975), 14-6-106 (1975 & Supp. 1979). Until 1996 its Constitution denied the franchise to "idiots and insane persons," without qualification. *See Ala. Const.* of 1901, art. 8, § 182 (as amended).[19] These are not proud words, and if Alabama directs this Court to gestures and policies, the value judgments embodied in its pejorative language should be weighed as well.

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[19] Even this revision was not undertaken by Alabama of its own volition, but was a byproduct of the general overhaul mandated by this Court's decision in *Hunter v. Underwood,* 471 U.S. 222 (1985) (striking Alabama's constitutional provision denying voting rights to misdemeanants for "crimes of moral turpitude" including miscegenation; "tramp[s]" and "idiots and insane persons" were similarly disenfranchised).

II. ALABAMA HAS TAKEN A PROUD STAND IN DEFENSE OF ITS "DIGNITY" HERE, BUT ITS HISTORIC TREATMENT OF ITS CITIZENS WITH DISABILITIES IS NOTHING TO BE PROUD OF.

Petitioners turn to the historical record in support of their claims for immunity. (Pet. Br. at 6-7).[20] They point to isolated incidents from Alabama's past as evidence of Alabama's benevolence towards persons with disabilities. (Pet. Br. at 7-10.) Having called on history, they cannot be heard to complain when history answers. In particular, Alabama's historical treatment of the mentally ill and mentally retarded offers a sharp rejoinder to Alabama's averments of good faith and good will.

Amici do not detail this history because they nurture a grudge for Alabama's past sins, but because Alabama, when left to its own devices, has consistently refused to do its duty by its citizens with disabilities. When finally faced with federal standards, Alabama spent the next 30 years trying to wriggle out of them. Only at the beginning of a new century did Alabama agree to meet the previous

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[20] Alabama is right about one thing – its "state's rights" argument is not new. In 1854, Congress passed a land-grant bill for construction of mental hospitals which President Franklin Pierce vetoed on the ground that "Congress did not have this power to usurp states' rights – even in defense of human rights." *Action for Mental Health, Final Rep. of Joint Comm'n on Mental Illness and Health* 286 (1961). In fact, when Alabama attempted to enact its first comprehensive mental health statute, it identified "anti-Federalism" as one of the primary obstacles to reform. *Alabama Mental Health Plan* 1 (Sept. 1, 1965) (hereafter "Plan").

century's standards. *See Wyatt v. Sawyer*, 2000 U.S. Dist. LEXIS 10398 (M.D. Ala. July 13, 2000).

A. The Past is Prologue: Mental Health in Alabama from the 1860s to the 1960s.

In 1854, the indomitable Dorothea Dix came to Alabama to lead the effort to establish a state mental hospital. Her lone crusade prompted a state legislator to acknowledge, in the language of his time:

> [W]e must admit [the] lamentable fact that the state of Alabama, one of Heaven's most favored social communities whose population claim[s] to be recognized as a Christian and civilized people, alive and adequate to all the purposes of self-government, has existed as a sovereign state for thirty years, and yet she has wholly... neglected to perform one of the first moral, social, and religious duties -- that pleasing duty of charity to the afflicted.

Katherine Vickery, *A History of Mental Health in Alabama* 22 (1965). Ms. Dix's campaign resulted in the passage of a law establishing Alabama's first mental health facility,[21] but this law hardly represented a discharge of the

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[21] This is today known as "Bryce Hospital," named after its first superintendent. The facility for black patients, formerly known as Mount Vernon, is today in existence as an integrated facility called "Searcy Hospital." In 1921, Alabama established a facility for white developmentally disabled patients which eventually became known as "Partlow State School and Hospital." *Amici* use the contemporary names for these facilities.

"moral, social and religious duties" Alabama owed its citizens. Instead it heralded the beginning of a 100-year reign of misfeasance and nonfeasance, accomplished through willfully inadequate funding, lack of oversight, and indifference toward the rights of Alabama's citizens with mental disabilities. The sampling of problems below barely scratches the surface:

Lack of Funding

- Twenty years after establishing Ms. Dix's hospital, Alabama had still failed to appropriate any funds for it. Vickery at 40.
- In 1918, the state appropriated for the health of farm animals more than twice what it appropriated for human health. Hastings H. Hart, Russell Sage Foundation, *Social Problems of Alabama*, 11 (1918) (hereafter "Hart (1918)"). Alabama's appropriations for public health generally were less than one-fourth the national average, and only one other Southern state appropriated as little in proportion to its population. Hart (1918) at 33. Little changed in the next 40 years. In 1960, Bryce and Searcy received $2.50 daily per patient while the national average was $4.06. In 1960, the Birmingham Zoo spent more than $2.50 a day feeding one lion or tiger. Vickery at 288 (quoting Charles Morgan, *Mindpower* 1-4 (1959-60)).
- State highway allocations during the years 1945-65 fluctuated from 15.2% to 28.5 % of the budget; education expenditures fluctuated from 27.6% to 36.7%; and pension expenditures fluctuated from 2.9% to 4.3% but mental health never gained in all

of those years more than 1.7% of appropriations from the state treasury. *Alabama Mental Health Plan (A Condensed Version)* 43 (Feb. 1966).

- In 1964, Bryce and Searcy operated on a $3.00 per day, per patient allotment for food, clothing, housing and treatment. Partlow subsisted on $3.05. James Sidney Tarwater, *The Alabama State Hospitals and the Partlow State School and Hospital: A Brief History* 28 (1964) . These levels were the same as they had been in 1935, despite interim inflation. *See Report of the Trustees of the Alabama Insane Hospitals, Annual Rep. of Superintendent* 85 (1935) (hereafter "1935 Rep.").
- In 1966, after passage of the controversial Mental Health Act, Alabama still spent only 62% of the national average on mental health -- as it had for the preceding 20 years. Plan at 74, 76. Its *per diem* of $3.20 was acknowledged by the state to be "possibly the lowest in the nation." Plan at 2.

Improper Classification or Total Lack of Facilities

- From the beginning, aged, epileptic, paralyzed, and malarial patients were thrown into the pot with those classified as "imbeciles" or "idiots," almost one-tenth of them dying in the year 1869. Vickery at 41.[22] 100 years later, inappropriate placement

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[22] The physically ill fared no better. The tuberculosis hospital in Wetumpka was a penitentiary, and all the nurses and staff were inmates. "It is rather extraordinary," a study noted, "that citizens of Alabama who need public treatment can obtain it only by getting themselves committed to the penitentiary." Hart (1918) at 22.

was "more appallingly acute than ever before in the history" of Searcy and Partlow. Tarwater at 26.

- By 1918, Bryce still had no separate wards for sick and surgical cases or tubercular patients. Hart (1918) at 25.
- The hospital for "feebleminded" children was not constructed until 1921– 100 years after statehood – and then only admitted white patients. Hastings H. Hart, Russell Sage Foundation, *Social Progress of Alabama*, 14-15 (1922).
- Mentally ill prisoners were often thrown in with the general population rather than referred to the hospital, Vickery at 15, and conversely, "criminally insane" prisoners were often sent to the hospital. Tarwater at 13.A class action involving prisoner classification pends today. *Bradley v. Harrelson*, CV-92-A-70-N (M.D. Ala.).
- Alabama continued to place developmentally disabled and physically ill persons in the mentally ill population for 100 years. In the 1960s, Bryce and Searcy were still complaining of inappropriate placement of mentally retarded patients there. *See, e.g., Rep. of the Trustees of the Alabama State Hospitals to the Governor*, 74, 76 (1964) (hereafter "1964 Rep.").

Forced Sterilization

- In 1932, experts recommended segregation and sterilization for this "predatory class"-- the developmentally disabled. Vickery at 98.
- That same year, Partlow's Superintendent reported, "We are yet observing the rule of sterilizing all who

are dismissed. Up to the present time there ha[ve] been sterilized in the institution 129 cases, including 73 males and 56 females." *Report of the Alabama Insane Hospitals to the Governor,* § 4, at 88, 91 (1932).

- In 1935, Partlow trustees voiced support for an involuntary sterilization bill. 1935 Rep. § 4, at 89. *See also In re Opinion of the Justices,* No. 32, 230 Ala. 543, 162 So. 2d 123 (1935) (sterilization not cruel and unusual punishment for confined persons, if sufficient procedure provided). Alabama's involuntary sterilization law was finally struck in 1973. *Wyatt v. Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1973) (three-judge court).

Overcrowding/Understaffing

- In 1902 there were 372 patients at Searcy, and only one physician, and at Bryce there were four physicians and one intern for 1,206 patients. Tarwater at 21.
- Alabama superintendents complained of like overcrowding and staffing ratios for the succeeding 62 years. *See, e.g.*, 1964 Rep. at 74, 76. In 1964, the Superintendent of State Hospitals concluded that overcrowding was "more appallingly acute than ever before in the history of" Partlow and Searcy. Tarwater at 26.
- In 1943, understaffed Bryce actually had a women's ward which the patients ran. Vickery at 176.
- In the 1970s, Alabama's facilities were still described as "overcrowded, plagued by fire and other emergency hazards" and falling short of

humane standards for treatment because of these problems – just as they had been in the first three decades of the century. *Compare Wyatt v. aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974), 344 F. Supp. 373, 381 (M.D. Ala. 1972) *with* 1935 Rep. at 85-86.

Physical Abuse of Patients

- In 1870, in an effort to curb patient abuse, the Superintendent of Bryce resorted to fining employees for their abusive treatment of patients. Vickery at 47.
- Nonjudicial efforts evidently failed, as patient abuse was "widespread" at Alabama's mental health facilities during the 1990s, more than 120 years later. *See Wyatt v. Rogers*, 985 F. Supp. 1356, 1377-78 (M.D. Ala. 1997) ("[s]taff members punch, hit, and kick defenseless mentally-retarded residents").
- A skeletal sampling[23] of 1990s physical abuse in Alabama's mental health system includes: (1) an incident at Searcy where a staff member jumped a mentally retarded patient, kicking her stomach and genitals while patients and staff cheered, *id.* at 1397; (2) a mentally ill patient abused to the extent that he had 40 injuries over approximately four years, including beatings by staff with a clipboard

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[23] For example, there were 240 incidents of physical abuse from November 1990-August 1993 at one Alabama facility alone. *Id.* at 1375.

to the head, necessitating 14 sutures, and beatings by staff with coathangers, *id.* at 1397-98; (3) a mentally retarded patient who bled to death after a beating by another resident while staff was "unavailable," *id.* at 1420; and (4) a staff member repeatedly striking a mentally retarded resident on the head with a 2x4 with bolts protruding from its sides, *id.* at n. 306.

- Dignitary injuries occurred as well, as when a staff member was found bouncing a ball off a resident's head for fun. *Id.* at n. 306.

Lack of Treatment/Warehousing

- In 1907, a Commission investigating scandals at Bryce described it as "a dumping ground for old, feeble, decrepit men and women afflicted with some mental and all sorts of physical ailments," and opined that, to relieve overcrowding, they should be turned to the county almshouses, where they would likewise receive "no medical or systematic treatment." Vickery at 74. *See also* Tarwater at 24.
- 70 years later, Bryce, Partlow and Searcy were still confining persons with mental disabilities without treatment. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344 (M.D. Ala. 1971). The *Wyatt* court found physical and therapeutic conditions deplorable, describing shoddily clothed patients living in barn-like structures that afforded no privacy, doing non-therapeutic work and receiving treatment for the convenience of the housekeeping staff rather than for their own good. *Id.* at 1343-44.

- In the 1990s, the facility for adolescents used solitary confinement in lieu of treatment: "Children were placed in a row of cells, with no fixtures other than a light, a cement floor, and little-to-no heat or air-conditioning." *Wyatt v. Rogers*, 985 F. Supp. at 1378.

B. Alabama's Abdications Catch Up with It.

When confronted with the facts detailed above, Alabama's response was not what this Court anticipated in *Alden* – a rush to conform its conduct to federal requirements. *Alden*, 527 U.S. at 755. Instead, Alabama did everything within its power to avoid having to abide by the minimum standards of federal and constitutional law.

In the landmark *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), the federal court found that Bryce used "scientifically and medically inadequate" treatment programs for involuntarily confined citizens. *Wyatt*, 325 F. Supp. at 784. It ordered Alabama to develop and implement, within six months, a treatment program that met constitutional standards. *Id.* at 785. Nine months later, Alabama had made "wholly inadequate" progress. *Wyatt v. Stickney*, 334 F. Supp. at 1344.

Accordingly, the court in 1972 enjoined Alabama officials to bring facilities into compliance with minimum constitutional standards developed with the assistance of mental health experts (the "*Wyatt*" standards). *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974) (standards for mentally ill); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D.

Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974) (standards for developmentally disabled).

But as the federal district court would write 26 years after *Wyatt* was filed, "the establishment of the *Wyatt* standards proved to be only the first step in an extended struggle to secure the rights of mentally ill and mentally retarded residents of Alabama's institutions." *Wyatt v. Rogers*, 985 F. Supp. at 1362. In 1981, plaintiffs were forced to return to court regarding Alabama's noncompliance with the court's 1975 orders. Alabama's response was to ask the court to dissolve the *Wyatt* standards. *Id.* at 1363 (describing 1981 litigation).

In 1986, Alabama entered into a consent decree which embodied the *Wyatt* standards. *See Wyatt v. Wallis*, 1986 U.S. Dist. LEXIS 20052 (M.D. Ala. September 22, 1986). In 1991, however, Alabama moved to vacate the consent decree and sought abrogation of the *Wyatt* standards embodied in the decree. *Wyatt v. King*, 811 F. 1533, 1543-44 (M.D. Ala. 1993). That same year, intervenors sued about Alabama's failure to release patients who no longer met commitment criteria.[24] *See id.* at 1370. The court refused to be complicit with "Alabama's unexcused failure for over 20 years to comply with [*Wyatt*'s] Standards" and did not vacate the decree. *Id.*

Ongoing violations of the consent decree led plaintiffs to file a motion to enforce in 1993. In their motion, plaintiffs presented evidence of outrageous

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[24] At the time, Alabama was one of only two states that allowed for indefinite institutionalization. *Wyatt v. King*, 773 F. Supp. 1508, 1516 (M.D. Ala. 1991).

conduct toward children at Eufaula. *Wyatt v. Rogers*, 985 F. Supp. at 1370. Eufaula, described by the court as a "penal facility" rather than the treatment center originally envisioned, was operated "in conscious violation of the consent decree." *Id.* at 1370-71.

While Alabama moved to vacate the consent decree, the evidence showed that children were physically restrained in hammerlocks, their thumbs were bent backwards as a restraint, forearms were placed against children's necks as they stood against walls, and knees to the back were used to pin them to the ground. *Id.* at 1377. Children were also placed in seclusion "[which] resembled solitary confinement in a prison more than therapeutic exclusion in a psychiatric facility." *Id.* at 1378. This ended only after federal litigation began. *Id.*

In its December 1997 order denying in part Alabama's motion to dissolve the consent decree and terminate *Wyatt*, the court documented dozens of ongoing violations of the consent decree besides beatings in the state's facilities for adults. *Wyatt v. Rogers*, 985 F. Supp. at 1392-99. The court specifically noted that Alabama had, by signing the consent decree, committed itself to meeting the *Wyatt* standards and had not done so. *Id.* at 1415. From 1986 until 1992, in fact, Alabama "did nothing" to provide community-based alternatives to institutionalization, and it did not show any initiative in this regard until it filed its motion to dissolve the consent decree based on its alleged compliance. *Id.* at 1416.

The court further found that while the State of Alabama was attempting to dissolve the consent decree, Alabama's investigation of physical abuse of patients consisted of "coverup and denials," "condemn[ing] the

messenger of the deficiencies rather than address[ing] the problem itself." *Wyatt v. Rogers*, 985 F. Supp. at 1399. The court found that without public scrutiny and judicial oversight, Alabama would do nothing. *Id.* at 1375. This attitude, of course, is the Alabama Punting Syndrome at its apogee.

CONCLUSION

In reading this brief, Alabama will no doubt cry "sensationalism" – as it has before when confronted with the ugly evidence of its own malfeasance. *See Wyatt v. Rogers*, 985 F. Supp. at 1373 n.50, 1374. But make no mistake. This is Alabama without the ADA and without federal oversight – a state's rights Paradise indeed, but falling short of bliss for many of its citizens.

Amici join the Fifth Circuit's Judge Rives today in an observation he made 35 years ago about state-sponsored discrimination:

> I look forward to the day when the State and its political subdivisions again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

Dent v. Duncan, 360 F.2d 333, 337-38 (5th Cir. 1966).

That day Judge Rives longed for in 1966 is not yet upon Alabama, which urges this Court to allow it to continue to opt out of the business of guaranteeing citizens'

rights in the name of states' rights. The Alabama Punting Syndrome has done its leaders no credit, but it is unlikely to disappear with any semblance of deliberate speed.

Wyatt is not a relic, yet Alabama blinks the truth about conditions that have been the subject of litigation even in the past few years. It tells this Court that it protects its citizens by "policies" and rules that in fact yank back any rights they purportedly confer. Alabama tells this Court that it is worthy of this Court's faith that it does not experiment on its citizens' rights. It tells this Court that it is worthy of the dignity of a sovereign when it has not acted like one. This Court should know that Alabama's protestations are pretense.

Respectfully submitted,

PAMELA L. SUMNERS*
180 N. MICHIGAN AVENUE
SUITE 2300
CHICAGO, IL 60601
(312) 201-9740
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
1733-15TH AVE. SOUTH
BIRMINGHAM, AL 35205
(205) 567-9326